

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0648 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIODS: 1998

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ISSUE

1. Controlled Substance Excise Tax: Imposition

Authority: IC 6-7-3-5. IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999).

Taxpayer protests the imposition of the Controlled Substance Excise Tax.

Statement of Facts

On September 23, 1998, a marijuana growing operation was discovered on a farm in Indiana. The marijuana was cut down and seized by the Indiana State Police and National Guard. Taxpayer was not arrested. On October 4, 1999, the county prosecutor of the county where the outdoor grow was located sent the Indiana Department of Revenue a letter stating that he would not press criminal charges against Taxpayer concerning the marijuana discovered on the farm. The Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on December 1, 1999 in a base tax amount of \$317,520.00. Taxpayer filed a protest to the assessment. A hearing on the protest was held on August 23, 2000. Further facts will be provided as necessary.

1. Controlled Substance Excise Tax: Imposition

Discussion

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Indiana Department of Revenue assessments are presumed to be correct and Taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b). Possession of the marijuana can be either actual or constructive. Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of drugs, presence on property where drugs are located, or mere association with the possessor is not sufficient. Hurst at 374-375. To prove constructive possession, there must be a showing that Taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. Hurst at 374.

In the Hall case, the Indiana Department of Revenue assessed Controlled Substance Excise Tax on a husband and wife. The couple owned and lived together in a residence. The marijuana was grown in a basement room with a locked door. Only the husband had a key to the room. Although the wife co-owned the house, lived in the house, did laundry in the room adjacent to the room which housed the marijuana, and the smell of marijuana permeated the house; the Court found that the wife did not have the capability to maintain dominion and control over the marijuana. Therefore she did not constructively possess the marijuana and the Controlled Substance Excise Tax was improperly imposed against the wife.

The issue to be determined in this case is whether or not Taxpayer had constructive possession of the marijuana. The farm had belonged to Taxpayer's deceased mother. A bank held legal title to the farm. Although Taxpayer and his brother lived in other residences, they cared for the farm. A tenant farmer did the actual farming. The marijuana was found in fields some distance from the house and yard. At the time the police arrived, Taxpayer was in his own house across the street. There were some paths from the corner of the farmhouse lawn to the fields and marijuana residue and rolling papers were found in the kitchen of the farmhouse. This is, however, significantly less circumstantial evidence than existed in the Hall case. This evidence does not support a finding that Taxpayer had the intent and capability to maintain dominion and control over the marijuana growing in the fields.

Finding

Taxpayer's protest is sustained.